EDY S

v.

PP

COURT OF APPEAL, PUTRAJAYA
MOHAMED APANDI ALI JCA
ANANTHAM KASINATHER JCA
DAVID WONG DAK WAH J
[CRIMINAL APPEAL NO: S-05-120-2010]
10 JANUARY 2013

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Conviction and sentence - Appeal against - Case solely premised on circumstantial and forensic evidence - Identification parade - Whether properly conducted - Whether conflicting evidence in identification of appellant - Absence of appellant's DNA at scene of crime - Whether gave rise to reasonable inference that appellant may not be culprit - Evidence of poor handling of exhibits in DNA analysis - Whether court undertaken maximum evaluation of prosecution evidence - Prima facie case - Whether established*

CRIMINAL PROCEDURE: *Prosecution - Prima facie case - Whether established - Murder - Case solely premised on circumstantial and forensic evidence - Conflicting evidence in identification of appellant - Evidence of poor handling of exhibits in DNA analysis - Whether mandatory task of maximum evaluation of evidence complied with - Whether prosecution established prima facie case*

The appellant was charged for the offence of murder by causing the death of one Chai Joon Boi ('the deceased'). From the opening speech of the prosecution at the High Court, the Deputy Public Prosecutor ('DPP') had stated that the case against the appellant was solely premised on circumstantial and forensic evidence. It was the prosecution's case that the appellant and one other person, presently at large, had entered into the deceased's house, robbed him and inflicted injuries on the deceased, resulting in his death. The wife of the deceased ('PW3') had testified that on 3 August 2006, she and the deceased had left their house to go to town when she saw two strangers in front of their house. The deceased had dropped PW3 off in town and returned home. When the deceased did not return to fetch PW3 as promised, PW3 went back to the house on her own and upon arrival, found

her husband lying motionless on the ground and covered with blood. Subsequently, the appellant had been arrested at a bus station when he could not produce his travel documents to PW4. He was then taken to the police post where the appellant and the sling bag he was carrying were handed over to the investigating officer ('PW17'). From the bag, 21 items were recovered and identified by the son and daughter of the deceased (PW6 and PW8) as missing items taken from their home. A T-shirt containing blood stains was also found inside the bag and after DNA profiling by the chemist ('PW14'), the blood stains were confirmed to have belonged to the deceased. The appellant was also seen by PW9 and PW11 in the vicinity of the place where the crime occurred and that the appellant had asked them where the Indonesian border was. The appellant was also identified by PW9 and PW11 in an identification parade conducted by the police. At the end of the trial, the learned judge found that the charge had been proved beyond reasonable doubt against the appellant and accordingly convicted the appellant, sentencing him to the mandatory death penalty. Aggrieved with the conviction, the appellant appealed to this court. The issues that arose were: (i) whether the trial judge had erred when he ignored the weakness of the evidence relating to the identification of the appellant by PW3, PW9 and PW11 and that the identification parade had not been properly conducted; (ii) that the learned judge failed to place any significance on the lack of DNA evidence linking the appellant to the crime scene and the murder weapon; (iii) that the learned judge failed to acknowledge the failure of PW14 and PW17 to explain the presence of one Al Muntaha Ali's blood in PW14's report and (iv) that the learned judge erred in not rejecting the evidence of PW4 and PW5 when they submitted that the appellant said the sling bag belonged to him.

Held (allowing the appeal; acquitting and discharging the appellant)

Per David Wong Dak Wah J delivering the judgment of the court:

(1) There was no eye witness testifying to the presence of the appellant in the house of the deceased and committing the robbery and killing. The only circumstantial evidence was from the testimonies of PW3, PW9 and PW11. PW3 testified that she noticed the two persons outside her house were wearing a blue coloured shirt and cream coloured shirt respectively. As for PW9, he testified that he had seen the

appellant carrying a pair of slippers and wearing a white shirt and dark jeans while the other person was wearing a red checked shirt and had carried a black and red sling bag. As for PW11's testimony, he said that he had seen the appellant wearing a white T-shirt while the other was wearing a striped shirt. In view of the apparent inconsistencies of the witnesses, their alleged sighting of the accused and one other person should be rejected. The learned judge had not taken this conflicting evidence into consideration which should be done for the reason that there was no direct evidence of the appellant's presence at the place of the crime. Furthermore, this sighting only showed that the appellant was present in the vicinity of the place where the crime occurred. Such failure of consideration had contravened the principle of maximum evaluation. (paras 15-17 & 20)

(1a) The police had failed to get a description from both PW9 and PW11 of the accused prior to the conduct of the identification parade. Further, the ten persons who were asked to participate in the parade were not of the same age as the accused. No photographs of the participants were taken and tendered in court, thus a judgment call could not be made as to whether the age difference of the participants had prejudiced the accused. Without any photographic evidence and the lack of any description of the appellant by PW9 and PW11 prior to the identification parade, the evidentiary value of the identification parade was found to be worthless. These omissions were not mere technicalities in view of the fact that the case against the appellant was wholly premised on circumstantial evidence. (paras 21, 25-26)

(2) The only evidence incriminating the appellant was the presence of the deceased's blood stains on the T-shirt found in the sling bag carried by the appellant. Apart from the presence of the deceased's DNA evidence at the crime scene, no other person's DNA was found there or on the alleged murder weapon, that was, the parang. There was also no DNA evidence of the deceased found on the nail clippings or body or clothing of the appellant. The presence of DNA in the T-shirt belonging to the deceased in the sling bag did not give rise to only one inference of murder on the

A part of the appellant. It also gave rise to an inference of an offence of receiving stolen properties. Further, the injuries suffered by the deceased as shown in photographs of the deceased's body at the crime scene showed that it was a violent crime and the place had been ransacked. Hence, the
B absence of any DNA evidence of the appellant raised the reasonable inference that the appellant may not be the culprit. (paras 29-31)

(3) There was no attempt by PW17 or PW14 to explain the
C status of Al Muntaha Ali whose blood was present in PW14's report *ie*, whether he was a suspect or why he was asked to give his blood for DNA analysis if he had nothing to do with the case. This omission may, by itself, not have any bearing on the outcome of the case but when the
D prosecution was solely premised on circumstantial evidence, the learned judge ought to have considered this omission together with the other evidence as required by the maximum evaluation test. This was clear evidence of poor handling of exhibits for DNA analysis. Such poor handling of exhibits for
E DNA profiling would result in a broken chain of the evidence of the prosecution. That by itself created doubt in the prosecution's case (*Abdul Aziz Lela v. PP*, refd). (paras 34 & 35)

F **(4)** The appellant's statement to PW4 and PW5 that the sling bag belonged to him was inadmissible as those statements were made without any caution administered to the appellant. The learned judge had failed to address this issue in his grounds and there was uncertainty as to whether he
G had taken those statements into consideration when arriving at his decision. Because of this failure, the mandatory task of maximum evaluation of evidence had not been complied with. (paras 36 & 37)

(5) When a prosecution is premised on circumstantial evidence,
H there can be only inference of guilt on the part of an accused. The prosecution evidence, considered in its totality, gave rise to the two inferences as mentioned earlier, hence the prosecution had failed to prove a *prima facie* case. The omissions in the prosecution's case and the errors of the
I learned trial judge mentioned earlier inevitably also made the decision of a *prima facie* case untenable. (para 42)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh atas kesalahan membunuh dengan menyebabkan kematian Chai Joon Boi ('si mati'). Dalam pembukaan kes pihak pendakwaan di Mahkamah Tinggi, Timbalan Pendakwa Raya ('TPR') telah menyatakan bahawa kes terhadap perayu adalah berdasarkan keterangan mengikut keadaan dan forensik. Kes pendakwaan adalah bahawa perayu dan lagi satu orang yang masih bebas telah memasuki rumah si mati, merompaknya dan telah mengakibatkan kecederaan kepada si mati sehingga menyebabkan kematiannya. Isteri si mati ('PW3') telah memberi keterangan bahawa pada 3 Ogos 2006, PW3 bersama-sama si mati telah meninggalkan rumah mereka untuk ke bandar apabila mereka melihat dua orang yang tidak dikenali di depan rumah mereka. Si mati telah menghantar PW3 ke bandar dan telah pulang ke rumahnya. Apabila si mati tidak kembali untuk mengambil PW3 seperti yang dijanjikan, PW3 telah pulang ke rumah dengan sendirinya dan mendapati suaminya dalam keadaan terbaring dan berlumuran dengan darah. Kemudian, perayu telah ditangkap di sebuah stesyen bas apabila dia gagal menunjukkan dokumen perjalanannya kepada PW4. Perayu telah dibawa ke pondok polis di mana perayu dan beg sandang yang dibawanya telah diberikan kepada pegawai penyiasat ('PW17'). Daripada beg itu, 21 item telah dijumpai dan dikenalpasti oleh anak lelaki dan anak perempuan si mati (PW6 dan PW8) sebagai barang-barang yang hilang dari rumah mereka. Sehelai T-shirt yang mempunyai kesan darah juga ditemui dalam beg dan selepas pemprofilan DNA oleh ahli kimia ('PW14'), kesan-kesan darah telah disahkan kepunyaan si mati. Perayu juga dilihat oleh PW9 dan PW11 di sekitar tempat di mana jenayah tersebut berlaku di mana perayu telah bertanya kepada mereka di mana sempadan Indonesia. Perayu juga telah dikenalpasti oleh PW9 dan PW11 dalam kawad cam yang telah dikendalikan oleh pihak polis. Di akhir perbicaraan, yang arif hakim telah mendapati bahawa pertuduhan telah dibuktikan melampaui keraguan munasabah terhadap perayu dan telah menyabitkan perayu, dengan menjatuhkan hukuman mati ke atasnya. Tidak berpuas hati dengan sabitan tersebut, perayu merayu ke mahkamah ini. Isu-isu yang timbul adalah: (i) sama ada hakim bicara telah khilaf apabila beliau tidak begitu prihatin terhadap kelemahan-kelemahan keterangan berhubungan pengenalpastian perayu oleh PW3, PW9 dan PW11 dan kawad cam tidak dikendalikan dengan betul; (ii) bahawa yang arif hakim telah gagal

memberikan apa-apa kepentingan ke atas ketiadaan keterangan DNA yang menghubungkan perayu dengan tempat kejadian dan senjata bunuh; (iii) bahawa yang arif hakim telah gagal mengakui kegagalan PW14 dan PW17 untuk memperjelaskan kehadiran darah kepunyaan seorang yang bernama Al Muntaha Ali dalam laporan kimia; dan (iv) bahawa yang arif hakim telah khilaf apabila tidak menolak keterangan PW4 dan PW5 bahawa perayu telah menyatakan yang beg sandang itu adalah miliknya.

Diputuskan (membenarkan rayuan; melepaskan dan membebaskan perayu)
Oleh David Wong Dak Wah H menyampaikan penghakiman mahkamah:

(1) Tiada saksi mata yang memberi keterangan mengenai kehadiran perayu di dalam rumah si mati dan melakukan rompakan dan pembunuhan tersebut. Keterangan ikut keadaan hanya dari keterangan PW3, PW9 dan PW11. PW3 memberi keterangan bahawa dia menyedari bahawa terdapat dua orang di luar rumahnya yang masing-masingnya memakai baju berwarna biru dan baju berwarna krim. PW9 pula memberi keterangan bahawa dia telah melihat perayu membawa sepasang selipar dan memakai baju berwarna putih dan seluar jeans gelap sementara temannya telah memakai baju merah berpetak-petak dan membawa beg sandang berwarna hitam dan merah. Keterangan PW11 pula adalah bahawa dia telah melihat perayu memakai baju putih dan temannya memakai baju berbelang-belang. Memandangkan terdapat beberapa percanggahan jelas antara saksi-saksi, dakwaan mereka bahawa mereka telah melihat perayu dan seorang lagi harus ditolak. Yang arif hakim tidak mempertimbangkan keterangan bertentangan ini yang mana perlu dilakukan atas sebab ketiadaan keterangan langsung berkenaan kehadiran perayu di tempat berlakunya jenayah itu. Tambahan, penglihatan ini hanya menunjukkan bahawa perayu hadir di sekitar tempat di mana jenayah itu telah berlaku. Kegagalan membuat pertimbangan itu telah melanggar prinsip penilaian maksimum.

(1a) Polis telah gagal memperolehi huraian berkenaan rupa perayu daripada PW9 dan PW11 sebelum pengendalian kawad cam. Juga, sepuluh orang yang telah diminta mengambil bahagian di dalam kawad cam itu bukan dalam lingkungan umur yang

sama dengan tertuduh. Gambar mereka yang mengambil bahagian tidak diambil dan dikemukakan di mahkamah, oleh itu keputusan penghakiman tidak boleh dibuat sama ada perbezaan umur di antara mereka yang mengambil bahagian telah memprejudiskan tertuduh. Tanpa keterangan fotografi dan ketiadaan huraian berkenaan rupa perayu oleh PW9 dan PW11 sebelum pengendalian kawad cam, keterangan kawad cam adalah didapati tidak bernilai. Peninggalan ini bukan teknikal semata-mata memandangkan fakta kes terhadap perayu adalah berasaskan sepenuhnya kepada keterangan mengikut keadaan.

(2) Satu-satunya keterangan yang membabitkan perayu adalah kehadiran kesan darah kepunyaan si mati di atas baju yang ditemui di dalam beg sandang yang dibawa oleh perayu. Selain daripada kehadiran keterangan DNA si mati di tempat jenayah berlaku, tiada lagi DNA kepunyaan orang lain dijumpai di situ atau atas senjata bunuh yang didakwa, iaitu, parang. Juga tiada keterangan DNA si mati yang dijumpai atas kerat kuku atau badan atau pakaian perayu. Kehadiran DNA si mati pada pakaian yang dijumpai di dalam beg sandang tidak menimbulkan hanya satu inferens pembunuhan oleh pihak perayu. Ia juga menimbulkan inferens kesalahan menerima barang-barang curi. Tambahan, kecederaan-kecederaan yang dialami si mati seperti yang ditunjukkan dalam gambar-gambar mayat si mati di tempat kejadian menunjukkan bahawa ia adalah satu jenayah kekerasan dan tempat itu telah digeledah. Oleh itu, ketidakhadiran keterangan DNA perayu menimbulkan inferens munasabah bahawa perayu mungkin bukan pembunuh di dalam kes ini.

(3) Tiada percubaan oleh PW17 atau PW14 berkenaan status Al Muntaha Ali yang darahnya terdapat dalam laporan kimia iaitu sama ada dia adalah orang yang disyaki atau mengapa dia disuruh memberikan darahnya untuk analisis DNA. Peninggalan ini dengan sendirinya mungkin tidak akan menjejaskan keputusan kes tetapi apabila pihak pendakwaan hanya bergantung kepada keterangan ikut keadaan semata-semata, yang arif hakim harus mempertimbangkan peninggalan ini seiringan dengan keterangan-keterangan lain seperti yang diperlukan oleh ujian penilaian maksimum. Ini adalah keterangan

jelas bahawa ekshibit-ekshibit analisa DNA telah ditangani dengan lemah. Pengendalian lemah ekshibit-ekshibit profil DNA akan menyebabkan rantai keterangan pihak pendakwaan terputus. Itu dengan sendirinya mewujudkan keraguan terhadap kes pendakwaan. (*Abdul Aziz Lela v. PP*, dirujuk).

(4) Kenyataan perayu kepada PW4 dan PW5 bahawa beg sandang itu adalah miliknya tidak boleh diterima kerana kenyataan itu dibuat tanpa apa-apa amaran diberikan kepada perayu. Yang arif hakim telah gagal menangani isu dalam penghakimannya dan terdapat ketidakpastian sama ada beliau telah mengambil kenyataan-kenyataan itu dalam pertimbangan apabila membuat keputusan. Disebabkan kegagalan ini, tugas mandatori penilaian maksimum keterangan telah tidak dipatuhi.

(5) Apabila kes pihak pendakwaan adalah berdasarkan keterangan ikut keadaan, hanya satu inferens sahaja yang harus wujud ke atas pihak tertuduh. Keterangan pihak pendakwaan, apabila dipertimbangkan secara keseluruhan, telah menimbulkan dua inferens seperti yang disebutkan, oleh itu pihak pendakwaan gagal membuktikan kes *prima facie*. Peninggalan dalam kes pihak pendakwaan dan kekhilafan oleh yang arif hakim seperti yang disebutkan sebelum ini juga telah membuatkan keputusan *prima facie* tidak dapat dipertahankan.

Case(s) referred to:
Abdul Aziz Lela v. PP [2011] 7 CLJ 1 CA ***(refd)***
Chan Sin v. PP [1949] 1 LNS 9 HC ***(refd)***
Chandmal & Anor v. State of Rajasthan AIR 1970 SC 917 ***(refd)***
Jaafar Ali v. PP [1999] 1 CLJ 410 HC ***(refd)***
Jayaraman & Ors v. PP [1981] 1 LNS 129 ***(refd)***
Martin v. Osborne [1936] 55 CLR 367 ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***

Legislation referred to:
Penal Code, s. 302

For the appellant - Ranbir Singh Sangha; M/s Ranbir S Sangha & Co
For the respondent - Samiha Rhazali; DPP

[Appeal from High Court, Kuching; Criminal Trial Suit No: S45-07-2006-I]

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah J:

Introduction

[1] The appellant was charged in the High Court of Kuching for the offence of murder of one Chai Joon Boi punishable under s. 302 of the Penal Code. The charge reads as follows:

> That you together with another still at large on the 3rd day of August, 2008 at about 0730 hrs, at house No 043, Jalan Tangga By Pass, Serian in the District of Serian, in the State of Sarawak, in furtherance of the common intention of you both, did commit murder by causing the death of one Chai Joon Boi, male, aged 54 years, (KPT: 520623-13-5083), and you have thereby committed an offence punishable under section 302 of the Penal Code read with section 34 of the same act.

[2] At the end of the trial the learned judge found that the charge had been proved beyond reasonable doubt against the appellant. He then accordingly convicted the appellant of the charge of murder and sentenced him to the mandatory death penalty prescribed by law. Aggrieved with the conviction, the appellant appealed to this court. Having heard this appeal, we unanimously allowed the appeal, set aside the conviction and discharged and acquitted the appellant. We now give reasons for our decision.

Factual Background

[3] From the opening speech of the prosecution at the High Court, the learned DPP had stated the case against the appellant is solely premised on circumstantial and forensic evidence.

[4] The brief facts of this appeal are these. It was the prosecution's case that the appellant and one other person presently at large who had entered into the deceased's house, robbed him and inflicted injuries on the deceased resulting in his death.

[5] The wife of deceased (PW3) had testified that at around 7am to 7.30am on 3 August 2006 she and the deceased were about to go to town and she saw two strangers somewhere in front of their house. The deceased took PW3 to the Serian town

where PW3 bought some vegetable for resale. The travelling distance to town was five minutes. After dropping off PW3, the deceased returned home. When the deceased did not return to pick PW3 at 9am as promised, PW3 drove another person's car back home. Upon arrival she found her husband lying motionless on the ground and covered with blood. The house was ransacked and she later discovered that some valuables were missing and they are one camera, her son's handphone, some pearl necklace, one ring and one pendant made from mahjong tile with her photograph inside, her daughter's rabbit-shaped earring and some rings belonging to her son.

[6] Some of the missing items were recovered from a sling bag found carried by the appellant when he was arrested and were later shown to PW3, PW6 (deceased's son) and PW8 (deceased's daughter) who had identified those items belonging to them.

[7] The appellant and another person were also seen by PW9 and PW11 while they were on their way to the padi field. In fact the appellant had asked them where the Indonesian border was to which PW11 said she did not know. It is also the testimony of PW9 that the appellant's companion had a black and red sling bag while the appellant was holding a pair of slippers.

[8] The appellant was arrested on 6 August 2006 by PW4 who was on mobile duty together with PW5 at the bus station at Kampung Kerusin, Keranji, Serian. The appellant was arrested after being questioned by PW4 about his travel document which he could not produce. They then took the appellants back to the police post at Tebakang where the appellant and bag were handed over to the investigating officer (PW17).

[9] The bag was opened by PW17 in front of the appellant, PW4 and PW5. From the bag, 21 items were recovered and identified by PW6 and PW8. A T-shirt containing blood stain was also found inside the bag. Those blood stains after DNA profiling by the chemist (PW13) belonged to the deceased.

[10] The appellant was also identified by PW9 and PW11 in an identification parade conducted by the police.

Finding By The High Court

[11] From the grounds of the learned judge, he had found the prosecution's case is premised solely on circumstantial evidence and after evaluating the evidence held that the prosecution had proven a *prima facie* case. The circumstantial evidence relied on are as follows:

(i) Two adults were seen by PW3 outside her house on the day of the incident;

(ii) The appellant was seen by PW9 and PW11 on the day of incident with the companion carrying a sling bag;

(iii) The appellant was found in possession of items belonging to PW3, PW6 and PW8; and

(iv) The T-shirt found in the appellant's bag contained the blood stains of the deceased.

[12] In arriving at such findings, the learned trial judge wrote in his judgment, as follows:

> I was actually aware of the various criticisms levelled by learned counsel for the accused on the alleged infirmities of the case for the prosecution, nevertheless I was satisfied that on the facts established by the prosecution a *prima facie* case had been made out. The alleged infirmities were related to the inadequacy of evidence to constitute proof that the accused entered the house of the deceased, that the accused committed the robbery of the valuables from the house, that the accused inflicted the injuries which caused the death of the accused and the murder weapon to inflict the injuries.
>
> ...
>
> On that basis, it is my conclusion that the relevant circumstantial evidence taken together points only to the guilt of the accused, notwithstanding the weakness in some of the circumstantial evidence taken and considered in isolation divorced from all the evidence. I don't not think the alleged non-compliance with the various technicalities relating to the identification parades conducted for PW9 and PW11 respectively where they positively identified the accused as the person they met and the omission of the formalities relating to the seizure of the incriminating items from

the accused by PW17 militate against the finding of *prima facie* case. In *San Soo Ha v. PP* [1968] 1 MLJ 34 Raja Azlan Shah (as he then was) had this to say:

> Conviction of acquittal of an accused person invariably depends on the credibility of witnesses as assessed by the trial Court and never on the question whether a particular legal procedure has been complied with.

I was, in the circumstances aforesaid, satisfied that the prosecution had established a *prima facie* case and accordingly called the accused to enter upon his defence.

Contentions By The Appellant

[13] Learned counsel for the appellant raised 54 grounds of appeal, many of them overlap each other and in our view they can be summarised under one ground and it is this:

> That the learned Judge erred in concluding that the prosecution had proven a *prima facie* case at the end of the prosecution case on the following grounds:
>
> (1) That the learned trial Judge had erred when he ignored the weakness of the evidence relating to the identification of the Appellant by PW3, PW9 and PW11.
>
> (2) That the learned Judge failed to place any significance on the lack of DNA evidence linking the Appellant to the crime scene and the murder weapon.
>
> (3) That the learned Judge failed to acknowledge the failure of the chemist and IO to explain the presence of one Al Muntaha Ali's blood in the chemist report.
>
> (4) That the learned Judge erred in not rejecting the evidence of PW4 and PW5 when they said that the Appellant said the sling bag belonged to him.

[14] Before we deal with the grounds, we remind ourselves of the duty of the court at the end of the prosecution case and can do no better than quote the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 AMR 203 which states as follows:

> (i) at the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all reasonable

inferences that may be drawn from that evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused;

(ii) ask yourself the question: If I now call upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to that question is "Yes", then a *prima facie* case has been made out and the defence should be called. If the answer is "NO" then, a *prima facie* case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. PP* [1963] MLJ 263.

With that we now analyse the contentions of the respective counsel.

Court Analysis

Ground 1

[15] It is undisputed by the prosecution that there was no eyewitness testifying to the presence of the appellant in the house of the deceased and committing the robbery and killing. The only circumstantial evidence is from the testimonies of PW3, PW9 and PW11.

[16] In so far as the evidence of PW3, she said she noticed two persons outside her house and they were wearing a blue coloured shirt and cream coloured shirt respectively.

[17] As for PW9 and PW11, their evidences are these. PW9 said in 2006 he saw that the appellant was carrying a pair of slippers and wearing a white shirt and dark jeans while the other person was wearing a red checked shirt and had carried a black and red sling bag. As for PW11's testimony, he said in 2006 he saw the appellant was wearing a white T-shirt while the other was wearing a striped shirt. Both of them had also identified the accused in an identification parade conducted by the police.

[18] The submissions of learned counsel for the appellant are in essence these. PW3's evidence:

> Learned Counsel submits that her sighting of two persons outside her house is of no evidential value as there was no affirmative proof from the prosecution that the Accused is one of the two persons she saw in front of the house. Further, there is no mention of such sighting of these two persons in her police report giving rise to an inference that there may not be any such sighting. With respect to the learned Judge, there appears to be no evaluation of such evidence in his grounds of judgment. In our view, her evidence is neither here nor there as we agree with learned Counsel for the appellant that there was no testimony by PW3 that the Appellant is one of the two persons she saw outside her house.

Evidence Of PW9 And PW11

[19] The relevant testimonies are these:

PW9

Q: Keadaan baju mereka?

A: Agak kotor kerana melalui hutan.

Q: Kotor dengan apa?

A: Tanah.

...

Q: Semasa nampak orang dalam kandang dan satu lagi apa pakaian?

A: Yang Kandang pakai baju putih dan jean warna gelap. Seorang lagi pakai berpetak warna merah.

Q: Apa pakaian baju orang di cam?

A: Baju kuning.

...

Q: Selepas tanya dan jawab apa mereka buat?

A: Saya tidak tahu kerana selepas itu saya lari kuat-kuat.

PW11

Q: Masa nampak keadaan baju mereka?

A: Shirts they wore were clean, not dirty.

Q: Pasti bersih?

A: Yes.

...

Q: Keadaan pakaian 2 orang itu?

A: The man in dock wearing white T-shirt. The other one wearing striped shirt.

...

Q: Selepas tanya mana batas apa berlaku?

A: I do not know what happened after that because they left.

Learned counsel for the appellant submitted that in view of such apparent inconsistencies of these two witnesses, their alleged sighting of the accused and one other person should be rejected.

[20] It appears to us that the learned judge had not taken this conflicting evidence into consideration which in our view should be done for the reason that the fact that there is no direct evidence of the appellant's presence at the place of the crime. Furthermore, it must not be forgotten that this sighting only shows that the appellant was present in the vicinity of the place where the crime occurred. Such failure of consideration in our view had contravened the principle of maximum evaluation.

Identification Parade

[21] The complaint of learned counsel for the appellant is simply that the identification parade was not properly conducted. It concerns firstly the failure by the police to get a description from both PW9 and PW11 of the accused prior to the conduct of the identification parade. The second omission of the police is that the ten persons who were asked to participate in the parade are not of the same age of the accused.

[22] In respect of the first point, we can do no better than refer to the case of *Jaafar Ali v. PP* [1999] 1 CLJ 410; [1998] 4 MLJ 406 where the court said as follows:

> where the primary issue is the identity of the accused, the principles set out in *Turnbull* must be followed. Justification of the accused by PW9 cannot be good within the meaning of *Turnbull* as PW5 failed to give any description of the accused to the police as soon after the incident as evidence in support.

There is no dispute here that no such description was given by both PW9 and PW11.

[23] As for the second complaint, the evidence was that the oldest participant in the parade was 41 years old with the youngest 18 years old. Seven of the participants were over 30 years old, with the remaining three, 18, 20 and 24 respectively. The accused at that time was 21 years old.

[24] As to how an identification parade should be conducted, the instructive opinion of Willan CJ in *Chan Sin v. PP* [1949] 1 LNS 9; [1949] MLJ 106 at p. 108 is most useful:

> We would further point out that in this country it has always been the practice in Police Identification Parades that all the persons on the Parade should be of the same nationality as that of the suspected person, as far as possible they should be from the same station in life as that of the suspected person; and also there should be no great disparity of ages in the persons on the Parade. In *Teo Peen Soon & Ors. v. Reg.* [1956] MLJ 241, Whyatt, CJ at p. 243 said:
>
> > Now with regard to the third appellant, the prosecution's case is a little stronger because the evidence given at the trial shows that the complainant did identify him at an identification parade. At the hearing of this appeal however, when the third appellant was asked what he wanted to say to the Court, he stated that when he was picked out at an identification parade, the other persons on the parade were school boys with two exceptions; those two exceptions were tall persons like himself. He then went on to say that those two tall persons were taken away from the parade before the complainant was actually asked if she could make her identification and he summed up his version of that identification parade by saying he thought it was unfair. If his account of it is truthful and accurate, it certainly was unfair. ...

[25] From the evidence which we have stated earlier, most of the participants were of different age. We are also further handicapped by the fact that no photograph of the participants were taken and tendered in court so that we can make a judgment call as to whether the age difference of the participants had prejudiced the accused. Without any photographic evidence and the lack of any description of the appellant by PW9 and PW11 prior to the identification parade, we are left with no choice but to find that the evidentiary value of the identification parade to be worthless

and the learned judge should not have taken into consideration of the evidence of identification of the appellant in the identification parade. It is also not insignificant that the identification parade was conducted on 18 August 2006 which is 15 days from the date of the alleged sighting.

[26] Before we leave this issue, we wish to state that we, with respect to the learned judge, are not able to agree that these omissions are technicalities in view of the fact that the case against the appellant is wholly premised on circumstantial evidence.

Ground 2

[27] The essence of this ground is the failure by the learned judge in placing no significance on the lack of DNA evidence linking the appellant to the crime scene and the murder weapon.

[28] The use of DNA evidence in criminal trial is most prevalent in recent times and this is understandable as it is such a powerful tool that it can obtain a conviction as well as gaining an acquittal for those wrongly accused. With the exception of identical twins, no two people have the same DNA. Hence in a sexual offence cases, the presence of biological evidence such as hair and semen or blood of a suspect on the victim or at the place of incident can place that suspect at the scene of the crime. This evidence when properly collected and analysed is enough to convict a person of a crime as that proof amount to proof beyond reasonable doubt. As such, the law demands that the court must ensure that when dealing with DNA evidence that all the strictest guidelines are complied with.

[29] In this case, the only DNA evidence incriminating the appellant was the presence of the deceased's blood stains on the T-shirt found in the sling bag carried by the appellant. Apart from the presence of the deceased's DNA evidence at the crime scene, no other person's DNA was found there or on the alleged murder weapon, that is, the parang. There was also no DNA evidence of the deceased found on the nail clippings or body or clothing of the appellant.

[30] Viewed in that context, we are of the view that the presence of DNA in the T-shirt belonging to the deceased in the sling bag did not give rise to only one inference of murder on the part of the appellant. In fact it can give rise to an inference of an

offence of receiving stolen properties. We are also fortified in our view of the second inference as there is no logical explanation as to why the appellant, if he were the culprit, would take a T-shirt belonging to the deceased and containing the deceased's blood stains and put it in the sling bag. This conduct is not consistent to a reasonable behaviour of a person who had robbed and killed someone. On the contrary, the absence of the appellant's DNA on the T-shirt gives rise to the inference that he did not put that T-shirt in the sling bag.

[31] Further the injuries suffered by the deceased as shown in photographs of the deceased's body at the crime scene tell us that it was a violent crime and the place had been ransacked. Hence the absence of any DNA evidence of the appellant in our view can give rise to a reasonable inference that the appellant may not be the culprit. In fact the court is at a loss as to why there is no DNA evidence of any third party at the crime scene. The photographic evidence does not show us that the crime scene had been wiped clean by the culprit.

Ground 3

[32] That the learned judge failed to acknowledge the failure of the chemist and investigating officer (IO) to explain the presence of one Al Muntaha Ali's blood in the chemist report.

[33] Learned DPP had submitted that there was no objection by the appellant's counsel as to the presence of Al Muntaha Ali's blood sample in the chemist report and hence this ground is without merit. With respect to the learned DPP, we are of the view that it was not for the appellant's counsel to object but rather the duty of the prosecution when conducting the case to ensure that all evidence is accounted for and explained. This duty is premised on the basic role of the prosecution and that is they bear the burden of proof throughout the criminal trial and an accused person need not prove anything, but only raise a reasonable doubt.

[34] In this case, there was no attempt by the IO or the chemist to explain the status of this person. Was he a suspect or not? Why was he asked to give his blood for DNA analysis if he has nothing to do with this case? This omission may by itself not have any bearing on the outcome of the case but when the prosecution

case is solely premised on circumstantial evidence, the learned judge ought to have considered this omission together with the other evidence as required by the maximum evaluation test.

[35] This is clear evidence of poor handling of exhibits for DNA analysis. As held recently in *Abdul Aziz Lela v. PP* [2011] 7 CLJ 1, such poor handling of exhibits for DNA profiling will result in a broken chain of the evidence of the prosecution. Such is the case in this appeal. That by itself creates doubt in the prosecution's case.

Ground 4

[36] That the learned judge erred in not rejecting the evidence of PW4 and PW5 when they said that the appellant said the sling bag belonged to him.

The relevant statements made to PW4 are these:

Q: Bagaimana tahu beg dia?

A: Saya Menyoal suspek

Q: Apa

A: Siapa punya beg itu? Mula-mula enggan jawab. Seterusnya baru mengaku itu beg dia?

Q: Bagaimana cakapan suspek mengaku? Apa dia cakap?

A: Mula-mula dia tidak bercakap. Kemudian ditanya berkali-kali dia cakap 'iya, itu beg saya'.

The relevant statements made to PW5 are these:

Q: Bagaimana beg itu tertuduh yang punya?

A: Apa bila mengaku

Q: Bagaimana dia boleh mengaku?

A: Setelah saya bertanya berulang kali.

[37] There is little doubt in our mind that what the appellant had said to PW4 and PW5 is inadmissible as those statements were made without any caution administered to the appellant. With respect to the learned judge, he had failed to address this issue in

his grounds and we are thus left unsure whether or not he had taken those statements into consideration when arriving at his decision.

Again it is our view that because of this failure, the mandatory task of maximum evaluation of evidence had not been complied with.

Conclusion

[38] As mentioned earlier, the prosecution case is premised on circumstantial evidence; hence it is prudent that we apply strictly the approach adopted in previous cases.

[39] Dixon CJ in *Martin v. Osborne* [1936] 55 CLR 367 set out the approach in the following terms:

> If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of the fact to be proved is so high that the contrary cannot reasonably be supposed (375).

[40] In *Jayaraman & Ors v. PP* [1981] 1 LNS 129; [1982] 2 MLJ 273 Syed Othman FJ (as he then was) at p. 280 opined as follows:

> I am well aware that the 'irresistible' formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *Mc Greevy v. Director of Public Prosecution* where it was argued at page 279, before the House of Lords that in criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the accused and (b) exclude every reasonable explanation other than the guilt of the accused.

[41] In the Indian jurisdiction, the Supreme Court there in *Chandmal & Anor v. State of Rajasthan* AIR 1970 SC 917, had this to say:

> It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. That is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt. (See also: *Ghambir v. State of Maharashtra* AIR [1982] SC 1157).

[42] The principle distilled from the above judicial pronouncements is simply that when a prosecution is premised on circumstantial evidence, there can be only one inference of guilt on the part of an accused. Applying the above approach to the factual matrix and for reasons mentioned in our analysis, we find that the prosecution evidence, considered in its totality, gave rise to the two inferences as mentioned earlier, hence we are left with no alternative but to find that the prosecution had failed to prove a *prima facie* case. The omissions in the prosecution's case and the errors of the learned trial judge mentioned earlier inevitably also made the decision of a *prima facie* case untenable.

[43] For the above reasons, we find that the learned judge had erred in calling for the defence of the appellant and unanimously allowed the appeal by the appellant. The conviction and sentence is hereby set aside and in place we accordingly ordered that the appellant to be acquitted and discharged for the alleged offence of murder.